

Lectures

THE SOLICITOR GENERAL AND THE AMERICAN LEGAL IDEAL[†]

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IT is an honor to join the list of illustrious persons who have been asked to deliver the prestigious Alfred P. Murrah Lecture. Although the title of my lecture is "The Solicitor General and the American Legal Ideal," I want to make clear at the beginning that I do not claim for myself the mantle of the ideal lawyer. After being the Solicitor General for almost two years, however, I have reached some tentative observations on how my office, the Office of the Solicitor General of the United States, has in some measure been able to attain and maintain the mentality of the ideal lawyer of yesteryear.

Let me start, though, with some observations about America's attitude towards lawyers. Given the recent tendency of politicians and the media to depict lawyers as the root of many of the country's ills, it will probably not surprise many of you to learn that in a recent (1993) survey,¹ 52 percent of Americans could not name a lawyer they admired.² Of those that could, two of the top five were the television characters Matlock and Perry Mason, and another, Justice Thurgood Marshall, is dead.³ The two remaining were F. Lee Bailey, the noted trial attorney, and my boss, Janet Reno, the Attorney General!⁴

These findings were confirmed by a 1993 poll by the American Bar Association which found that only 40 percent of those surveyed gave law-

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1. Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1, 20, 22, 24.

2. *Id.* at 24.

3. *Id.*

4. *Id.*

yers a favorable rating, just above the 28 percent received by stockbrokers and the 21 percent for politicians.⁵ The ABA study also suggested that "familiarity breeds contempt" in this regard, since those having most contact with lawyers were likely to be least positively disposed toward the profession.⁶

More recent surveys confirm that America is not enamored of the legal profession. *U.S. News and World Report* reported this week that 69 percent of Americans say lawyers are only sometimes honest or not usually honest, and 56 percent believe that lawyers use the system to protect the powerful and get rich.⁷ And even F. Lee Bailey may be in trouble, for polls indicate that 25 percent of Americans have less respect for lawyers in general after watching preliminary hearings in the O.J. Simpson trial.⁸

One news report suggested that the headline with respect to the criticism of lawyers today was *not* that non-lawyers held lawyers in low esteem, since such an attitude follows in the long tradition of lawyer-bashers from Shakespeare and Martin Luther to Benjamin Franklin. Rather, it was that even *lawyers* are beginning to hate each other, that the profession has turned upon itself in masochistic ways previously unobserved. Perhaps the most overt example of this trend can be found in the logo of a company created some years ago by a lapsed lawyer to publish self-help legal manuals such as do-it-yourself divorce kits. The logo shows a necktied shark holding a briefcase, across which is drawn a diagonal red slash!

I am not really in a position to determine to what extent self-loathing within the legal profession has reached unprecedented heights in recent years. It may well be that perennial concerns have simply gained greater media attention of late. Of more interest to me is that discussions of this topic in legal, professional, and academic journals often seek to contrast the perceived deficient lawyer of today with the respected "complete" lawyer of yesteryear, to identify the "ideal" lawyer against whom everyone else, particularly one's adversaries, ought to be unfavorably compared.

Describing this "ideal" lawyer is not an easy task, although my colleague and now Dean at Yale Law School, Anthony Kronman, has made an impressive effort to do so in his book *The Lost Lawyer*. Kronman calls him "the lawyer-statesman" who is, at once, a devoted public citizen, looked to for advice not only about means but also ends, possessed of extraordinary deliberative power, and exceptionally wise.⁹ Kronman argues that "two traits set the statesman apart: first, love of the public

5. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62.

6. *Id.*

7. Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 52.

8. Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52, 53.

9. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 12 (1993).

good, and second, wisdom in deliberating about it.”¹⁰ The statesman is one who aims at the good of the community to which he or she belongs.¹¹ This approach, of course, may demand more than any one lawyer could ever satisfy, leaving us to wonder whether it provides much help in evaluating living and breathing human beings.

Others have attempted in less philosophically and historically rigorous fashion than Kronman to identify the special qualities that traditionally characterized great lawyers in American history and can be found on occasion among members of today’s bench and bar. This latter approach, however, runs the risk of falling into nostalgia for the “good old days” and endowing certain prominent figures from the past with qualities their colleagues and clients would have found surprising. Two new books have, in my opinion, overcome that obstacle. In *The Betrayed Profession*,¹² my friend and hero Sol Linowitz successfully blends the personal and the historical. The book was written, Linowitz says, “to offer some suggestions as to how we lawyers might rekindle pride in our profession and restore the practice of law to the respected position it once occupied.”¹³ Linowitz, for example, quotes favorably a remark attributed to one of his mentors, the distinguished Elihu Root, a Wall Street lawyer and Secretary of State. Root is reported to have once told a client, “The law lets you do it, but don’t It’s a rotten thing to do.”¹⁴

Harvard Law Professor Mary Ann Glendon’s much discussed book, *A Nation Under Lawyers*,¹⁵ also uses personal experiences and historical and sociological data to question whether our profession has undergone a change for the worse in recent years. Glendon observes that “it was once . . . [the] lawyer’s duty to persuade the client to attend to the spirit as well as the letter of the law.”¹⁶ She rejects what she sees as the more modern view of the lawyer as “friend-of-the-client,” first and foremost.¹⁷

I am not prepared to say that there was ever a “golden age” of lawyering, especially given the undisputed exclusion of minorities, women, and Jews from the mainstream legal establishment until quite recently, as well as the failure of the legal community to concern itself with the legal needs of the least well-off. But there was a vision of an ideal lawyer, Kronman’s lawyer-statesmen, one which was more complex than the client-centered win-at-all-costs vision of lawyers which is prevalent in some circles today.

With all this in mind, I wondered if it was possible to get beyond merely cataloguing the traits that an ideal lawyer should possess or describing lawyers that we think, in some less systematic way, embody

10. *Id.* at 54.

11. *Id.*

12. SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

13. *Id.* at xii.

14. *Id.* at 48.

15. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

16. *Id.* at 37.

17. *Id.* at 38.

such an ideal. Can't we find greater certainty anywhere? What does an ideal lawyer do all day? What does the job description of an ideal lawyer look like?

Let me suggest one answer to these questions which derives from my personal experience. Ever since I was nominated to become the Solicitor General of the United States almost two years ago, hardly a day has gone by that I have not been told by another lawyer that I have the best lawyer's job in America. Now, there may be many explanations for why this is said. Clearly, most lawyers do not have their pick of interesting, important cases to handle or the opportunity to argue a half-dozen times a term before the Supreme Court. And being the Government's top lawyer has its other privileges. But I think that such comments are motivated by other considerations.

Perhaps unconsciously, lawyers may covet the job of Solicitor General because they believe it offers those who occupy that position the opportunity to act in ways that come closest to their version of what the ideal lawyer should be and demands qualities that the ideal lawyer should possess. Whether any particular incumbent rises to the occasion is another matter; the important point is that the office is rightfully perceived to provide the *possibilities* for lawyering unlikely to be found elsewhere in the profession.

I do not intend to recite the history of my office. Suffice it to say, the Office of the Solicitor General was established in 1870 in order to provide the Attorney General with assistance in the discharging of his official duties.¹⁸ Over the intervening one hundred and twenty-five years, however, a tradition of independence, both within the Department of Justice and the Executive Branch as a whole, has developed with respect to the Solicitor General's role. Although the Solicitor General is appointed by the President and works for the Attorney General, it is rare for his decisions to be overruled by either of his superiors. Consequently, for most purposes, the Solicitor General has the last word with respect to whether and on what grounds the United States will seek review in the Supreme Court and determines what cases from the federal trial courts the Government will seek to appeal.

In this process, the Solicitor General is not a "hired gun." Indeed, he has a captive client, who may not seek new counsel if he receives disagreeable legal advice. One of my predecessors, Solicitor General, later Attorney General, Francis Biddle, was prompted by this circumstance to remark:

[The Solicitor General] determines what cases to appeal, and the client has no say in the matter, he does what his lawyer tells him, the lawyer stands in his client's shoes, for the client is but an abstraction

18. Act of June 22, 1870, ch. 150, §§ 1, 2, 16 Stat. 162 (codified at 28 U.S.C. § 505 (1988)).

... [H]is guide is only the ethic of his own profession framed in the ambience of his experience and judgment.¹⁹

This is a rather rhapsodic and inaccurate picture of the Solicitor General's role. But it does capture the fact that his responsibility is ultimately not to any particular agency or person in the federal government but rather "the interests of the United States" which may, on occasion, conflict with the short-term programmatic goals of an affected governmental entity.

The Supreme Court recognized this tension when it noted this term that:

the practice . . . [of concentrating the litigating authority in the Solicitor General] serves the Government well; an individual Government agency necessarily has a more parochial view of the interest of the Government in litigation than does the Solicitor General's office, with its broader view of litigation in which the Government is involved throughout the state and federal court systems. Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official.²⁰

To be sure, the Solicitor General is not a policy-maker in the sense that other presidential appointees at the Cabinet and sub-cabinet levels are. But in the course of acting as a legal policy-maker regarding governmental litigation, he acts as a lawyer-statesman, advising his colleagues not only as to means to achieve certain ends but also helping them to clarify ends in light of wisdom that is often gained from court challenges to federal policies.

Aside from having a client who cannot seek other representation, it is also true that the Solicitor General occupies an especially prominent position as an officer of the federal courts, particularly the Supreme Court, where the "ethics of his profession framed in the ambience of his experience and judgment"²¹ must be punctiliously observed. Even if he were not inclined for reasons of principle to adhere to high standards of candor and fair dealing before the Court, the pragmatics of his "repeat player" status before the Court would require such adherence. For example, lawyers on my staff and I have argued in forty of the fifty-two cases heard by the Court so far this term.²² Thus, like an ideal lawyer of old, the Solicitor General's long-term relationship with the Court reinforces his duties as an officer of that Court and creates a sense of trust and obligation.

In so many ways, the Solicitor General is invited by tradition, as well as statute and regulation, to step out from the role of partisan advocate to assist in the orderly development of the law and to insist that justice be

19. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962).

20. Federal Election Comm'n v. NRA Political Victory Fund, 115 S. Ct. 537, 542 (1994).

21. BIDDLE, *supra* note 19, at 97.

22. As of January 19, 1995.

done even where the immediate interests of the federal government may not appear to benefit. For, as it is inscribed on the walls of the Department of Justice, "The United States wins its point whenever justice is done its citizens in the courts."²³ Let me give four examples of how the Solicitor General acts in the interests of justice.

First, Solicitors General have "acquiesced" in efforts by opponents in litigation to obtain Supreme Court review of cases in which the government prevailed below. They have done so because, while confident of the government's position, they believed that it was in the best interest of the country to have a contested legal question definitively resolved by the Supreme Court. For example, in a case called *O'Melveny & Myers v. FDIC*,²⁴ the government prevailed in the Ninth Circuit on the question of whether state or federal law governed in certain instances when the FDIC became the receiver of a failed savings and loan. When the private party in the court of appeals sought certiorari, we told the Supreme Court it ought to hear the case, putting at risk our victory below, because of the "profound importance" of the question in terms of both money (over a billion dollars) and the need for a uniform national standard.²⁵ In a unanimous opinion, the Court reversed the Ninth Circuit decision and decisively rejected each of our arguments.²⁶ I do not regret our decision to acquiesce, for we got what was required—a definitive statement of the law on an issue of public importance.

Second, Solicitors General have "confessed error" in cases where the government has won in the lower courts but the Solicitor General concluded that a "fundamental error" had led to that result. In many cases, as in life itself, fundamental error is found in the details, and I think that is reflected in the cases in which I have confessed error. Cases like *Reed v. United States*²⁷ are typical. In *Reed*, a crack dealer argued that the district court had miscalculated the amount of drugs she had distributed and thus had sentenced her to an extra five years in prison. The court of appeals rejected her argument,²⁸ but when the case got to my office, a fresh look at the undisputed facts indicated that she was right. We asked the Supreme Court to vacate our "victory" and remand for further proceedings, and the Court did so.²⁹

I should note that lower court judges do not look favorably upon confessions of error. Solicitor General Simon Sobeloff, who later served on

23. See *Brady v. Maryland*, 373 U.S. 83, 87 & n.2 (1963).

24. 969 F.2d 744 (9th Cir. 1993).

25. Brief for the Federal Deposit Insurance Corporation at 4-5, *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994) (No. 93-489).

26. See *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994).

27. 114 S.Ct. 1289 (1994).

28. *United States v. Casel*, 995 F.2d 1299 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 472, *and cert. denied*, 114 S.Ct. 1308 (1994), *and vacated sub nom. Reed v. United States*, 114 S. Ct. 1289 (1994).

29. *Reed*, 114 S.Ct. at 1289; see also, e.g., *Mohwish v. United States*, 113 S. Ct. 1378 (1993). See generally David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEORGETOWN L.J. 2079 (1994).

the federal court of appeals, was quoted as saying: "When I was Solicitor General, . . . I thought that confessing error was the noblest function of the office. Now that I am a Circuit Judge, I know it is the lowest trick one lawyer can play upon another."³⁰

And Judge Learned Hand, the subject of Professor Gerald Gunther's well-received new biography, said: "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General."³¹

Third, the Solicitor General is often asked formally by the Supreme Court through a process referred to in the relevant jargon as "CVSG" (or "call for the views of the Solicitor General") to express his views on whether a pending petition for certiorari in a non-government case should be granted. In such instances, the Court is not seeking the advice of an advocate or a partisan, but rather of an officer of that court committed to providing his best judgment with respect to the matter at issue.

Thus, as many of you might have heard, my office recently filed a brief in the case of Brett Kimberlin, a federal prisoner who claimed that his right to hold a press conference regarding former Vice-President Quayle's alleged drug use was unconstitutionally interfered with. The legal issue before the Court regarded the proper standards for reviewing qualified immunity claims of government officials. Even though the defendants in the case are all federal officials who had prevailed in the court of appeals, we took the position that the Court should grant certiorari and reverse because the lower court's decision imposed a burden on the plaintiff which was "incorrect" and conflicted with "well established" law.³² Although the ruling of the lower court may have favored the United States and its employees, we opposed it because we believed it was contrary to the long-term interests of the law.

Fourth, and finally, there are rare occasions when the Solicitor General will decline to defend the constitutionality of a federal statute. Because of the respect to which the Congress is entitled as a coordinate branch of government, Solicitors General traditionally have recognized a general duty to defend congressional statutes against constitutional challenges. But owing to the fact that the Constitution is the supreme law of the land,³³ and the President—and by extension the Solicitor General—has a duty to "take care that the laws be faithfully executed,"³⁴ Solicitors General have not risen to the defense of the Acts of Congress in two situations. First, Solicitors General have always sided with the President in disputes over the constitutionality of congressional attempts to circum-

30. Archibald Cox, *The Government in the Supreme Court*, 44 CHI. B. REC. 221, 225 (1963).

31. *Id.* at 224-25.

32. Brief for the United States as Amicus Curiae at 14-15, *Kimberlin v. Quinlan*, 115 S. Ct. 2552 (1995) (No. 93-2068).

33. See U.S. CONST. art. VI.

34. U.S. CONST. art. II, § 3.

scribe presidential power. The first such case was *Myers v. United States*³⁵ in 1926, in which the Solicitor General successfully argued that Congress had impermissibly intruded upon the prerogatives of the Executive Branch by limiting the President's power to remove a postmaster. In that case, the Court invited Senator George Wharton Pepper to argue on behalf of Congress in defense of the legislation.³⁶

The second situation in which the Solicitor General will not defend a statute is when he determines that the law is patently unconstitutional. "In such cases," Solicitor General Wade McCree has written, "the Solicitor General's Office is called upon to give full faith and credit to the fundamental law embodied in the Constitution, even at the expense of the federal statute."³⁷ The decision to abandon a statute is made only in the most extreme instances. When Attorney General Griffin Bell informed Congress that the Justice Department would not appeal decisions invalidating statutes, his letters always ended with the following statement: "The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the [statute] at issue."³⁸

I admit there is a tension for those who believe that the Solicitor General, like the ideal lawyer-statesman, should exercise independent judgment in all circumstances. But the policy of defending all but the most blatantly unconstitutional congressional statutes must be viewed in the light of strong separation of powers concerns. Granting the Solicitor General broader latitude would permit the Executive Branch to use litigation as a form of post-enactment veto of legislation that the Administration dislikes, while permitting Congress to defend its own statutes would undermine the Executive Branch's status as the litigating arm of the government.³⁹

Thus far, I have declined in a few instances to defend acts of Congress on one or the other of these grounds. When such declinations occur, Congress is so advised and may assume responsibility for the defense itself.⁴⁰ In one instance, we chose not to appeal a district court decision

35. 272 U.S. 52 (1926).

36. *Id.* at 21.

37. Wade H. McCree, Jr., *The Solicitor General and His Client*, 59 WASH. U. L.Q. 337, 343-344 (1981).

38. Letter from Griffin Bell, Attorney General, to Robert Byrd, Senate Majority Leader 2 (May 8, 1979) (on file with author).

39. See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 86-87 (1992); Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1152-1154 (1988).

40. The Attorney General is required by law to notify the Congress of any decision by the Solicitor General (or the Attorney General) not to defend an Act of Congress. The Ethics in Government Act of 1978 provides in part:

The Attorney General shall notify the [Senate Legal] Counsel with respect to any proceeding in which the United States is a party of any determination by the Attorney General or Solicitor General not to appeal any court decision affecting the constitutionality of an Act or joint resolution of Congress within

which struck down on First Amendment grounds a statute that prohibited the use of the name "Crazy Horse" on beer labels.⁴¹ Congress seemed to accept the decision not to go forward.

In another set of cases, the situation was more complicated. Prior to 1934, Congress had provided that children born outside the United States in a marriage between an American citizen and a foreign national were American citizens if their father was a citizen, but were not citizens if only their mother was a citizen.⁴² While this distinction may seem invidious to modern ears, it was consistent with the prevailing international standards of the time. In 1934, Congress abolished the distinction between citizen fathers and mothers, but applied it prospectively only. Recently, foreign-born children of American women have sought relief in federal court, claiming that the pre-1934 statute violated equal protection. In the leading case, *Wauchope v. United States Department of State*,⁴³ the Ninth Circuit held that the government had failed to sustain its burden of maintaining a classification based on gender, declared the statute unconstitutional, and awarded the plaintiffs citizenship.⁴⁴ It is fair to say that we had serious reservations about many of the court's legal holdings, including questions of standing, laches, and especially the remedy. But on the crucial question of constitutionality of the classification, the Attorney General, acting on my recommendation, informed Congress that "[t]he Ninth Circuit's ruling on the merits is consistent with modern developments in the Supreme Court's jurisprudence concerning statutory distinctions based on gender," and thus we decided not to seek certiorari or otherwise challenge the holding.⁴⁵ Since that time, the Administration has worked with Congress to amend the statute at issue to grant these persons citizenship retroactively.⁴⁶

I have not taken your time this afternoon just to let you know how happy I am to be the fortieth Solicitor General, although that is very true. This speech is also not intended to be an advertisement for myself. Believe me, I am still learning my way around the office, so to speak. Rather, my objective was to describe for you an institution where the lawyer *is expected* to look not only to the interests of his client, but also to the long-term effects upon the government, and upon the country, of po-

such time as will enable the Senate to direct the Counsel to intervene as a party in such proceeding pursuant to section 288e of this title.

2 U.S.C. § 288k(b) (1988). Congress has also imposed such a requirement through annual appropriations measures. See, e.g., Pub. L. No. 98-411, § 203(a), 98 Stat. 1558 (1984); Pub. L. No. 96-132, § 21(a), 93 Stat. 1049-50 (1979); Pub. L. No. 95-624, § 13, 92 Stat. 3464 (1978); see also *Heckler v. Edwards*, 465 U.S. 870, 873-74 & n.3 (1984).

41. See *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227 (E.D.N.Y. 1993).

42. Rev. Stat. of 1874, § 1993 (originally enacted as Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604).

43. 985 F.2d 1407 (9th Cir. 1993).

44. *Id.* at 1419.

45. Letter from Janet Reno, Attorney General, to Michael Davidson, Senate Legal Counsel 2-3 (Oct. 15, 1993) (on file with author).

46. See Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 1, tit. I, 108 Stat. 4305, 4306 (to be codified in scattered sections of 8 U.S.C.).

sitions taken in Court; *is expected* to forfeit victories in the interest of the greater good of justice; and *is expected* to exhibit "absolute candor and fair dealing" before the courts in the faithful discharge of his responsibilities.

The demands of this job, I would suggest again, are ones that most lawyers deep down believe the ideals of the profession require of them and of their brothers and sisters at the bar. As Elihu Root is supposed to have said, "About half the practice of a decent lawyer [should consist] in telling would-be clients that they are damned fools and should stop."⁴⁷ It is that odd circumstance in which an office, rather than a person or a philosophical construct, comes closest to capturing the concept of the "ideal lawyer."

Despite the unique confluence of factors which in a sense demand the Solicitor General to strive towards the ideal, the path is not easy. For all the impressive powers of the Solicitor General and the special role that he plays in the management of federal litigation, in fact the job is filled with difficult conflicts with respect to issues such as who is one's client, how does one separate policy and law, what are long-range as opposed to short-range interests of the United States, and where does one draw the line between the demands of one's duty as an advocate for the Executive Branch and one's responsibilities as an officer of the Court. The ideal and the reality are sometimes in painful tension.

As the late Solicitor General Dean Erwin Griswold said about the Solicitor General's job, "it can on occasion be a tightrope, but the Solicitor General should keep his balance."⁴⁸ But I am not the only one who should be practicing a balancing act. Practitioners will likely confront situations where they must decide whether they can represent certain clients and still remain true to their own values. They will have to resolve conflicts between their responsibility to clients and their duty as officers of the court. They will have to give clients advice that they would rather not hear and rather not pay to hear. It is not a simple task to keep one's balance, but it is possible if a lawyer has the right tools.

This is where the academy comes in. You must help to foster an atmosphere where discussion of ethics is expected, not exceptional. You must work to instill in your students a sense of ideals in the law, not just zeal for a client's cause. We all must work to make notions of the lawyer-statesman a ruler by which we judge our own conduct, as well as the conduct of those whom we celebrate. While we may never measure up to the myth-shrouded figures of the past, we should not shrink from the task for fear of falling short. It is *our* future, and the future of our profession, which are at stake.

Thank you.

47. GLENDON, *supra* note 15, at 37.

48. See ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER* 330 (1992).